No. 91-1826

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner

v.

CATHOLIC SOCIAL SERVICES, INC., *et al.*

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents in Catholic Social Services, Inc. *et al.* and League of United Latin American Citizens *et al.* (hereafter, "CSS" and "LULAC") respectfully urge that the Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

In addition to those *CSS* opinions cited by INS in its Petition, another Court of Appeals opinion is at 820 F.2d 289 (9th Cir. 1987) and another related District Court opinion is at 664 F. Supp. 1378 (E.D. Cal. 1987).

STATEMENT OF THE CASE

In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"), P.L. 99-603, 100 Stat. 3359, the cornerstone of which was the largest legalization program in U.S. history, perhaps in world history. In an extraordinary act of grace, the American people reached out to that large "shadow population," *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. ——, 111 S.Ct. 888, 891 (1991), undocumented aliens who had been living underground in our midst for many years. Congress further recognized that through legalization, limited INS enforcement resources could be shifted and concentrated more effectively on the U.S. borders.

Eligible aliens were those who were unlawfully resident but who had put down roots (i.e., they could show "continuous residence") in the U.S. since prior to January 1, 1982 (8 U.S.C. § 1255a(a)(2)(A)), and were also physically present in the U.S. since November 6, 1986, IRCA's effective date. § 1255a(a)(3)(A). (Further statutory citations are to Title 8, unless specified otherwise.)[1] Critical to these cases are the exceptions that allowed brief absences after January 1, 1982, as well as after enactment of IRCA.

Both *CSS* and *LULAC* involved successful class action challenges to regulations which had disqualified large numbers of aliens who traveled briefly outside of the U.S. In neither case did INS appeal from the merits of the decisions. The District Courts in both cases briefly tolled the termination of the application period for eligible aliens who, because of travel outside the U.S., had

[1] A comparable legalization program, but with shorter durational residence requirements, was established for Special Agricultural Workers, or "SAWS"; the key SAW eligibility factor is employment in farm labor for 90 days between May 1, 1985 and May 1, 1986. § 1160(a)(1)(B)(ii); 8 C.F.R. § 210.3(a). However, the judicial review provisions in both are virtually identical. *Cf.* § 1160(e) *with* § 1255a(f). See also, *McNary, supra*, 111 S.Ct. at 890-91.

their applications unlawfully rejected or who were discouraged from applying because of such travel. While INS did not appeal from the merits of either decision, it did appeal these relief orders. Pending appellate review, class members clearly required protection from deportation and forced unemployment. In *LULAC*, it was provided by stipulation, while in *CSS*, by a Ninth Circuit order.

Over 300,000 putative class members have so far come forward, at least half of which INS has agreed are "prima facie" eligible for legalization; so, they have temporary work/stay documents. Reversal by this Court will return them to the unregulated "shadow underground." Under the present protective orders, identifying information is confidential so deportation will not begin unless they are independently apprehended. This outcome will completely thwart the dual Congressional objectives intended by amnesty and employer sanctions.

IRCA's purposes are both ameliorative and instrumental. As Congress explained, many undocumented aliens had put down deep roots in the U.S., many had "strong family ties" with "U.S. citizens and lawful residents" and they had long been "contribut[ing] . . . their talents, labor and tax dollars" to the nation. H.R. Rep. No. 99-682, Pt. I, 99th Cong., 2d Sess., Oct. 14, 1986, 49; (a substantial portion of this page of the Committee Report is quoted in *McNary*, 891 n.4). But, "because of their undocumented status, these people live[d] in fear, afraid to seek help when their rights are violated . . . by criminals, employers or landlords or when they become ill." H.R. Rep. No. 99-682, *supra*, 49. Legalization, "would allow [such] aliens to contribute openly to society and it would help to prevent the exploitation of this vulnerable population in the work place." *Id.*

Instrumentally, Congress' plan was that the legalization of the "shadow population," combined with the first-

time-ever prohibition in § 1324a(a) on employing aliens without express INS permission to work (commonly called "employer sanctions"), "would enable INS to target its enforcement efforts on new flows of undocumented aliens. . . ." *Id.*

In interpreting IRCA's text, it is important to recognize that any doubts should be resolved in favor of an interpretation maximizing the number of eligible aliens whose status is thereby regularized. Only such an interpretation would be consistent with the Congressional directive that the Act "be implemented in a liberal and generous fashion" because "[s]uch implementation is necessary to ensure the true resolution of the problem and to ensure that the program will be a one-time-only program." *Id.* 72.[2]

[2] Several IRCA provisions confirm that Congress sought to maximize the number of legalized aliens. First, Congress realized that many aliens would be loathe to approach INS, the most feared officialdom during the "shadows" years, to claim legalization. Congress knew that such fear had resulted in low turn-out rates in the legalization programs of other nations. H.R. Rep. No. 99-682, *supra*, 73. So, it authorized INS to contract with, and fund, churches, social service agencies, etc. entities that aliens would believe had a greater fidelity to their interests. These groups would preliminarily screen the eligibility of aliens who thought they might be legalizable. *Ibid.*; § 1255a(c)(1)-(3). These recruiters were called "Qualified Designated Entities", or QDEs. See also IRCA, P.L. 99-603, § 111(c).

Second, Congress barred INS from accessing QDE documents. § 1255a(c)(3), "to assure applicants that the legalization process is serious, and not a ruse to invite undocumented aliens to come forward only to be snared by the INS." H.R. Rep. No. 99-682, *supra*, 73.

Third, Congress mandated "an extensive education and outreach program," *id.* 73, whereby, before the application period began, INS would "broadly disseminate information respecting . . . the requirements to obtain" legalization. § 1255a(i).

Fourth, Congress allowed for a *full* 12-month application period so the most timorous could "chew and stew", i.e., learn about the requirements for legalization, overcome their fears of contacting officialdom, and then act. Earlier legalization programs in other countries suffered from too short an application period. Meissner, Papademetriou, & North, *Legalization of Undocumented Aliens: Lessons From Other Countries*, 1-2 (1986) (Argentina, six months, *id.* 9, Venezuela, four months, *id.* 11, Canada, 60 days, *id.* 13.).

It was this very INS outreach program, and the mandated false information given out by INS and QDEs, that were the means of *erroneously* informing aliens of the illegal policies that were later invalidated in both *CSS* and *LULAC*, a disinformation campaign that thereby rejected class members by planting sterile seeds.

Keeping this Congressional imperative in mind, INS suggests a remarkable interpretive paradox: the only judicial review available to the class members concededly eligible is through § 1255a(f), which however is *not* available because they did not file applications within the designated one-year period. Even though the nature and extent of how INS mulcted them did not completely become known until just eight days (*CSS*) before the application period closed, or after (*LULAC*), INS' response is, "Well, that's your fault—next time you deal with us, just don't believe anything we say."

When Congress drafted IRCA, it is fair to conclude that it assumed INS would obey the statute and draft consistent regulations. In these cases, INS by its own admission violated the statute (reflected by its failure to appeal the merits of these cases), preventing thousands of otherwise eligible aliens from seeking legalization despite Congress' clear intention that they be legalized. This Court now faces the same question that was before it in *McNary*: what access to judicial review did Congress intend these aliens to have? Class-wide resolution at an early stage that permits work authorization and stays of deportation, or futile administrative exhaustion and hundreds of thousands of individual cases clogging the administrative system and the courts of appeals for years?

1. **The CSS Case.** Because of the need for "an extensive education and outreach program prior to the application period," H.R. Rep. No. 99-682, *supra*, 73, Congress allowed for a six-month hiatus before applications would be accepted. However, to insure that no eligible alien would be ousted from the U.S. in the interim, it entitled all apprehended aliens to a stay of deportation and a work permit, even before they had filed an application, if they could "establish a prima facie case of eligibility" for legalization. § 1255a(e)(1); 8 C.F.R. § 245a.1(n). A similar entitlement was provided for after the application period began. § 1255a(e)(2); *McNary*, *supra*, at 892. Immediately upon IRCA's enactment, legalizable aliens had a crucial need for a stay and a work permit because the other key part of IRCA, the prohibition on employment of aliens without express INS permission to work, became effective upon enactment of the measure. § 1324a(a); *McNary*, 891 n.2.

Initially, INS refused to issue stay/work permits. For this reason, the *CSS* plaintiffs filed suit to compel such implementation. Two hours before the District Court's TRO hearing, INS implemented the statute by means of telegraphic instructions to its offices. However, in the very same telegram, INS adopted a policy that declared that no post-November 6, 1986 absence could be "brief, casual and innocent" unless the otherwise-eligible alien had obtained prior INS permission to travel.[3]

[3] The basic dispute over the meaning of "brief, casual, and innocent absences" long preceded *CSS*. Its history reveals that the invalidated regulation was more than a simple inadvertent, unintentional, or negligent error. The doctrine had evolved as an interpretation of the suspension of deportation authority in § 1254(a)(1) based on *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). See *CSS v. Meese*, 685 F. Supp. 1149, 1157-59 (E.D. Cal. 1988). That interpretation was squarely rejected by this Court in *INS v. Phinpathva*, 464 U.S. 183 (1984), but then just as squarely reinstated by IRCA, § 315(b).

When IRCA was still aborning in the House Judiciary Committee, the Attorney General vigorously opposed § 315(b), H.R. Rep. 99-682, *supra*, 124, *and* urged in its stead authorization to implement the very same policy invalidated by *CSS*. *Id.* 116. Finally, still trying to win the lost battle, the President's IRCA signing statement conditioned his assent on an understanding that § 1255a(a)(3)(B) *did* authorize what the Attorney General had sought all along. During the 1986-87 *CSS* appeal, the Attorney General vigorously tried to have the President's statement deemed controlling. See generally, Garber and Wimmer, "Presidential Signing Statements as Interpretation of Legislative Intent: An Executive Aggrandizement of Power," 24 HARV. J. ON LEGIS. 363 (1987).

Such persons were turned away at the INS threshold because they were deemed "statutorily ineligible" even to *apply for* legalization because of such unauthorized travel, even if otherwise "brief, casual, and innocent". (Such aliens "will be considered *ineligible to apply for legalization.*" INS Legalization Wire No. 14, p. 4. (emph. add.).) Until May, 1987, when IRCA's first regulations were published in the Federal Register, the *only* way an alien could know of the policy was by reading the November 14, 1986 telegram.[4] Under this policy, INS immediately began to oust aliens otherwise eligible for legalization.

CSS immediately amended its complaint to challenge the prior travel permission requirement. On May 3, 1988, partial summary judgment was granted invalidating the regulation and providing that "brief, casual, and inno-

[4] The District Court in *CSS* has not yet ruled upon plaintiffs' claims that this telegraphic means of promulgating such crucial policies violated 5 U.S.C. §§ 552(a)(1)(D) and 553(b)-(c); see *Morton v. Ruiz*, 415 U.S. 199 (1974); *Anderson v. Butz*, 550 F.2d 459, 462-63 (9th Cir. 1977); *Aiken v. Obledo*, 442 F. Supp. 628, 647-55 (E.D. Cal. 1977). It is administrative lawmaking like this that prompted Congress to enact the publication requirements of the Freedom of Information Act and the Federal Register Act. 1 Davis, ADMIN. LAW TREATISE § 6.09, at pp. 392-94 (1st ed. 1958).

cent" absences did not require prior INS approval. 685 F. Supp. 1149. This ruling was not appealed. In June and August, remedial orders were entered. App. 22a-49a; see further pp. 10-13 below.

2. **The LULAC Case.** *LULAC* involved another illegal policy, a conceptual variant of the policy challenged in *CSS*. This regulation interpreted § 1255a(a)(2) to provide that an alien's requisite *illegal* "continuous residence" since January 1, 1982 would be deemed "discontinuous" if, after a brief absence, the alien had reentered the U.S. by means of fraudulent INS documentation. The rationale was that the use of facially valid documentation rendered the alien's subsequent residence valid, even though the alien, if later apprehended, could never thereby avoid swift ouster. In July, 1987, LULAC sued in the Central District of California challenging the regulation. On July 15, 1988, the court ruled that reentries into the U.S. after brief absences improperly using INS documentation did not sever continuous illegal residence. App. 50a-60a. As in *CSS*, INS did not appeal from this merits ruling.

3. **The Jurisdictional Issue.** The district courts in these two cases assumed jurisdiction under 28 U.S.C. § 1331 (federal question) and 8 U.S.C. § 1329 (jurisdiction over "all causes . . . arising under any of the provisions of" the subchapter of the Immigration and Nationality Act ("INA") in which IRCA is located.[5]

IRCA provides for a very limited, specialized scheme for judicial review of an INS "determination respecting an application for adjustment of status. . . ." § 1255a(f)(1). Such a "determination" is reviewable only in the

[5] INS has blown hot and cold in these two cases. Jurisdiction was not raised during either District Court proceeding, nor was it raised by INS in the Court of Appeals. Just preceding the *CSS* oral argument, the Court *sua sponte* sought briefing on the issue; the Government then conceded jurisdiction following the decision in *McNary*. Then, following the recent rejection of *McNary*'s rationale, *Ayuda v. INS*, 948 F.2d 742 (D.C. Cir. 1991), the claim was reborn.

Court of Appeals and *only* if, after a "denial" of an application, § 1255a(f)(3)(A), (and the concomitant rescission of the stay of deportation/work permit), the alien is subsequently apprehended and ordered deported by INS.

Neither the *CSS* nor the *LULAC* plaintiffs sought a determination on any alien's discrete legalization application; none had received an INS "denial." Rather, they challenged, on constitutional and statutory grounds, the two pertinent eligibility regulations that the INS had instructed all of its staff, QDEs, and the Legalization Appeals Unit ("LAU") to follow in adjudicating individual applications.

Significantly, the LAU has no power to invalidate INS regulations on statutory or constitutional grounds. See below at p. 17 n.15. Exhaustion of an administrative appeal in such a case therefore is clearly futile. It must not be forgotten that an alien raising questions of the legality of a particular regulation in that process could do so only long *after* rescission of a stay of deportation and a work permit, a very daunting prospect.

4. **This Court's Decision in McNary.** After oral argument, the Ninth Circuit delayed its decision because circuit conflict over jurisdiction arose between *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir., 1989), a class action challenging a § 1255a regulation (as in these two cases), and *Haitian Refugee Center, Inc. v. McNary*, 872 F.2d 1555 (11th Cir. 1989), a class action challenging a § 1160 regulation and other procedures under the Special Agricultural Workers ("SAWs") half of the legalization program. App. 7a. Contrary to INS' current position, the Solicitor General then told this Court it should interpret the jurisdictional provisions identically. *Ayuda*, Govt. Opp. to Cert. at 16; *McNary*, Govt. Pet. for Cert. at 28.

This Court spurned INS' jurisdictional arguments, 7-2, in *McNary*, 111 S.Ct. 888, and remanded *Ayuda* for re-

consideration in light of *McNary*, 111 S.Ct. 1068.[6] Fundamentally, *McNary* broke no new ground, but merely confirmed a longer line of other cases that had ruled similarly under § 1329 and 28 U.S.C. § 1331.

5. **Relief In CSS.** On April 22, 1988, just eight working days before the § 1255a application period closed, the District Court in *CSS* enjoined enforcement of the "prior travel permission" regulation. 685 F.Supp. at 1160. As to the smaller subclass of aliens who had actually been fortunate enough to submit applications despite INS' "rejections" policy (those in the "pipeline"), INS was ordered to readjudicate their applications without reference to the invalid regulation. App. 24a-25a. INS has not appealed from this part of the order, effectively conceding the regulation's invalidity.

Another subclass consisted of a very large number of aliens that INS had improperly thwarted or discouraged from even filing applications based on the illegal "advance travel permission" regulation. Indeed, this effect was compelled by INS' own required procedures. For example, reflecting the earlier telegraphic staff instruction (see p. 7 above), the INS Legalization Manual, binding on both its own staff and QDEs, expressly stated that "[i]f there are major deficiencies in the application package *or if the applicant . . . is statutorily ineligible, the application will be rejected.*" *Id.* § IV-6. It made clear that an application is "rejected" when it is turned down *without* processing and without acceptance of the filing fee. *Id.* §§ IV-3, IV-6, IV-7 (describing the procedure "[i]f an applicant who has been rejected by the [INS or

[6] On remand, the D.C. Circuit, 2-1, rejected this Court's analytical framework based on a rationale that was not offered by either INS or the *McNary* dissenters, which did not reflect Congressional intent, the language, nor the logic, of *McNary*, and restated its earlier conclusion that the specialized review provision of § 1255a(f) precluded other jurisdictional bases. *Ayuda, supra* n.5.

its agents] insists on filing," or if an application received from a QDE is insufficient).[7]

Moreover, Article IV, ¶ 3.2 of the Cooperative Agreement between each QDE and INS required QDEs to comply with "all INS regulations relating to the legalization program." As a result, logic as well as the record evidence in these cases demonstrates that many eligible aliens *were* told by INS, or by QDEs acting as INS' agents, that they would not be permitted even to file an application because they did not satisfy INS' legalization eligibility standards invalidated in these cases.[8]

[7] Deposition testimony in these and other IRCA class actions has confirmed this practice, common in mass governmental benefit programs. *See, e.g., Schweiker v. Hansen*, 450 U.S. 785, 786-87 (1981); *Murillo v. Mathews*, 588 F.2d 759, 760 (9th Cir. 1978). It is often called an "informal denial", informal since no appeal rights accrue because the applicant fails to file an application due to the agency's advice that to do so would be futile. In INS parlance, it is often called "front desking" since the screening process occurs at the front desk of an INS office.

Strictly speaking, a "front desked" alien might have nevertheless been able to force acceptance of an application but the practical realities would seem to make such cases rare. First, a hefty filing fee, upwards of $420, was extracted by INS; second, a physical exam, which might cost even more, was required; attorneys' fees could even be greater; then, there was the time and energy required to pursue what seemed to nearly anyone to be the essence of futility, trudging on through the administrative appeals process, volunteering for deportation, securing counsel to petition the Court of Appeals to review the deportation order, and finally obtaining judicial review of the legalization denial, etc. See further below, pp. 17-19.

[8] INS' suggestion that the challenges to the regulations are not yet ripe, see discussion of *Lujan v. National Wildlife Fed'n*, 110 S.Ct. 3177 (1990), Pet., pp. 11, 13, nn. 13, 16, is surely answerable by its refusal to accept valid applications. It is the crucial denial of a temporary work permit and stay of deportation via "front desking" that is the "concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan*, at 3190.

Because the offending regulation was not invalidated until just eight days before INS stopped accepting applications, the *CSS* District Court granted the only effective relief for the subclass of thwarted or discouraged aliens at its disposal: it tolled the closing off of applications until November 30, 1987, a period just short of seven months. (The Court provided, alternatively, that if the order were appealed, then stayed, but later affirmed, the tolling period would extend for 180 days following the date affirmance became final.) App. 25a.[9]

6. **Relief In LULAC.** Relief in *LULAC* followed essentially the same pattern as that in *CSS*. It was not

[9] In two instances in its Petition, INS seriously misstates the nature and effect of the district court orders. First it states, at p. 7 n.7, that "the order effectively bars INS from deporting any individual who submits to INS an application contending he [sic] is entitled to relief. . . ." INS has advised class counsel that approximately ½ of the 300,000 aliens who have claimed membership in either the *CSS* or the *LULAC* classes are *not* class members. Accordingly, INS has *not* granted them stays of deportation or work permits, subjecting them, obviously, to deportation. Because they are not class members, "if the ruling stands, INS will" not "be compelled to examine on an individual basis more than 300,000 applications," Pet. 21.

Second, it is true that the number of claims of class membership has grown larger than it would have been had INS not appealed from the district courts' orders, because the judicial process has lumbered along despite all attempts for expedition. INS seems to believe that it is the fault of *class members* that now, "in 1992, more than *five* years after the November 6, 1986, INS is still receiving applications pursuant to the Ninth Circuit's order." Pet. 17-18. INS made both beds in which it lies; the first in the adoption of the substantive policy which it had very good reason to believe from the outset would not be tolerated by the courts (see pp. 6-7 n.3 above); the second in initiating the appellate process; it would be a supreme irony, tantamount to the famed observation of Anatole France regarding the equality of laws barring sleeping under bridges and the theft of bread, to rely on these factors to deny relief to these class members and thereby place them on the block for ouster from our land. They came because of what our form of democracy means throughout the world—the lesson they learn should not be that ours is a mean form of democracy.

until July 15, 1988, after the application period had closed, that the District Court enjoined enforcement of the regulation at issue. As in *CSS*, INS was ordered to reevaluate the applications of the subclass of aliens who were "in the pipeline." In addition, the Court tolled the application period deadline for the subclass of "front desked," discouraged and thwarted aliens for the same period as in *CSS*, i.e., until November 30, 1987. App. 50a-60a.

7. **INS Has Appealed Only From the Relief Tolling the Application Period For the Rejected and Discouraged Aliens.** In both cases, INS has readily acquiesced in the relief ordered for those "in the pipeline." Perversely, it is only the relief for those who it treated most egregiously that INS has challenged in both the Court of Appeals and here.

REASONS FOR DENYING THE WRIT

I. JURISDICTION.

1. **Certworthiness.** INS' petition requires nothing more than a straightforward application of last year's *McNary* opinion, a 7-2 decision. To be charitable, INS is trying to thread a mighty thin needle to escape from *McNary*. Moreover, it should be apparent that, in contrast to many issues that come before this Court, this one will have little future impact. This follows from the fact that IRCA's legalization programs have effectively been over for nearly four years. App. 84a. No camel's noses will slip under the tent in the form of new class actions. Therefore, this case does not even fit the rare situation where this Court wishes to do a quick *volte face* because such a desire is nearly always in the context of a pragmatic, crying future need for different law.[10]

[10] It is noteworthy that this Court did not accept the Government's suggestion in *INS v. NCIR*, 112 S. Ct. 551 (1991), Pet. for Cert. 1, to revisit *McNary's* resolution of the scope of federal question jurisdiction in INA cases.

Putting aside the absence of a common sense, pragmatic need to revisit *McNary* while its ink is still drying, INS' discovery of a "heart of the case" test lurking in the penumbras of *McNary* is unsupported in either the opinion's logic or its text, the text or legislative history of the statute, or even the analysis of the two *McNary* dissenters.

2. **The McNary Decision.** *McNary* broadly held that Congress had not intended to divest the district courts of their traditional jurisdiction under § 1329 and 28 U.S.C. § 1331 to hear *all* legal challenges to INS' policies and regulations (without reference to the disposition of any particular individual's legalization application), and that Congress had intended IRCA's specialized review procedure to apply *only* to individual challenges to those policies applied on a case-by-case basis:

> [W]e hold that [IRCA's specialized review provision] applies *only* to review of denials of individual . . . applications. Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired . . . 111 S. Ct. at 897 (emph. added.).[11]

McNary began its analysis with the plain language of § 1160(e)(1)-(3), the SAW analogue of § 1255a(f)(1)-(3), which created a specialized judicial review procedure applicable, by its terms, only to claims challenging "a determination respecting an application for adjustment of status." *Id.* 896. (The Solicitor General had

[11] *McNary* is nothing more than an application of this Court's broader doctrine, rooted in the practical need for economizing scarce judicial resources, which distinguishes between broad constitutional or statutory challenges to an agency's policies and narrow challenges to an agency's application of unchallenged policy to the facts of an individual case. *See, e.g., International Union, United Auto. Wkrs., etc. v. Brock*, 477 U.S. 274, 291 (1986) ("*UAW v. Brock*"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986).

argued that the two provisions were identical; see p. 9 above.) Adopting the lower courts' construction of this language. *McNary* stated:

> The critical words in [§ 1160(e)], however, describe the provision as referring only to review "of *a determination* respecting *an application*" . . . (emphasis added). Significantly, the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. *Id.*[12]

McNary therefore held that Congress intended that § 1255a(f)(3) review applies only to fact-finding or law-applying challenges to the "merits of a denial of a particular application" (*id.* 897), "rather than . . . general collateral challenges to unconstitutional practices and polices used by the agency in processing applications" (*id.* 896), or "generic constitutional and statutory claims." *Id.* 899. At no point did the Court draw a distinction between "a collateral challenge to INS' procedures, rather than the substantive standards under which INS evaluated applications. . . ." Pet. 12.

3. **The Ayuda II Decision.** The *Ayuda II* majority ignored both the plain text of § 1255a(f) and this Court's common sense prior construction, making no attempt to explain how the phrase "a determination respecting an application" by its terms supported a distinction between collateral and direct legal challenges. Instead, the majority simply concluded that this Court did not mean what it had plainly said. See *Ayuda II*, at 748-49 & n.5.

McNary concluded that INS could find no solace in the text of § 1160(e)(3)(B)/1255a(f)(3)(B) limiting court

[12] See also *Ayuda I*, 880 F.2d at 1349 (Wald, C.J., dissenting): "To the ordinary reader, . . . this phrase . . . appears to cover only the determinations that are made with respect to each application. . . ."); *Morales v. Yeutter*, 952 F.2d 954, 956-57 (7th Cir. 1991) (Posner, J.): "[I]t is apparent from the language of the provision and . . . the character of immigration proceedings, and . . . [*McNary*] held . . . that the provision is limited to cases brought by [an alien] whose application . . . is turned down.")

of appeals' review "solely [to] the administrative record" and stating that "findings ... shall be conclusive [subject to] abuse of discretion" or when directly contradicted by "clear and convincing facts" because generic statutory and constitutional challenges do not fit within that model of review; therefore, such challenges were not within Congress' contemplation of the scope of IRCA's narrow judicial review provision. *Id.* 896.

Ayuda II skirted deference to this conclusion. While conceding the premise, the *Ayuda II* majority claimed that Congress must have intended the § 1255a(f) "abuse of discretion" standard to be implicitly transformed into a "*de novo* standard"—despite total textual silence—whenever a plaintiff brought a legal rather than a factual claim. 948 F.2d at 748. But *McNary* expressly held otherwise, concluding that if Congress had intended § 1255a(f) to apply to generic legal challenges, it would have explicitly adopted a *de novo* standard of review. *McNary* 897.

4. **Meaningful Judicial Review.** INS claims that here, in contrast to *McNary*, there is an opportunity for "meaningful judicial review" (Pet. 12-13) thus overcoming the traditional presumption favoring district court jurisdiction. Pet. 11-12. The thrust of that argument is that a challenge to a regulation does not suffer by limitation to the administrative record, which ignores the clear INS policy that administrative reviewers are powerless to address generic challenges. INS also ignores *McNary*'s key conclusion: limiting judicial review of legalization denials to cases where aliens had to "voluntarily surrender themselves for deportation i[s] ... [q]uite obviously ... tantamount to a complete denial of judicial review for most undocumented aliens." *Id.* 898.[13]

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[13] INS concludes this argument with the suggestion that deportation proceedings would naturally follow denial of an application. ("In short, respondents readily could have awaited agency proceedings and challenged INS's regulations in deportation proceedings

McNary held that limiting generic challenges to § 1255a (f) review would create enormous practical hurdles. Nothing in INS' Petition offers any reason to abandon that conclusion. To do so now requires a conclusion that Congress intended individual legalization claimants, as a condition to obtaining judicial review of a statutory or constitutional challenge to an INS legalization policy:

1. to make a necessarily futile (and costly) application for legalization; [14]

2. to appeal the resulting denial to a LAU that has no authority to consider the merits (and thus rule in the alien's favor) on a statutory or constitutional claim; [15]

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that *would have been brought against them* if they had been denied relief [by the LAU]." Pet. 13-14 (emph. add.).

But there is no inexorable link between denial of legalization and deportation. Indeed, those who have resided in the "shadows" for 5, 10, 15, 20 years, have obviously shown keen evasion skills. Moreover, Congress created a Chinese Wall between INS legalization and enforcement staff, threatening the latter with severe criminal sanctions, if they used information collected in the legalization process. § 1255a(c)(5).

[14] The cost of filing legalization applications ranged from $185 for an individual to $420 per family. 8 C.F.R. § 103.7(b). See further, p. 14 n.11, above.

[15] *McNary* 896-97: "Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims to the procedures set forth in [the specialized review provision] is not contemplated by the language of that provision"); *see also Ayuda I*, 880 F.2d at 1332 nn.6 & 7 ("Facial challenges to the regulation [in a proceeding before the LAU] are not permitted"). Yet, inexplicably, INS persists in claiming that allowing district court class action challenges to regulations "bypasses adjudication by the expert administrative agency. . . ." (Pet. 11) (thereby "prevent[ing] the Attorney general's designated authority [the LAU] . . . from considering these central statutory issues." Pet. 13.

But, the LAU has no authority to reject a regulatory interpretation of a statute. *Matter of Fede*, Interim Dec. 3106 at 2-3 (BIA 1989) ("[a] regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges,

3. to waive the statutory right to confidentiality by voluntarily surrendering to the INS,[16] or wait however long to be apprehended by the INS for initiation of deportation proceedings (which the INS in its discretion could choose *not* to initiate—thus precluding judicial review altogether);[17]

4. to be issued an order of deportation and then file a futile appeal to INS' Board of Immigration Appeals;[18]

5. to file a petition for review in a court of appeals that has not had the benefit of prior district court consideration of these statutory or constitutional issues;[19] and

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and neither has any authority to consider challenges to regulations . . . any more than there is authority to consider constitutional challenges to the laws we administer.") See also, 8 C.F.R. § 103.3 (a)(3)(iii); *cf. Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions are obviously unsuited to resolution in administrative hearing procedures, and, therefore, access to the courts is essential to the decision of such questions.").

[16] See §§ 1252, 1255a(c)(4), (5); see also S. Rep. No. 132, 99th Cong., 1st Sess. 47 (1985) (QDE confidentiality provision encourages aliens to come forward "without fearing that their applications would be forwarded to the INS. . . ."); H.R. Rep. No. 99-682, *supra*, 73.

[17] *See McNary* 898 (aliens cannot obtain any review unless they "voluntarily surrender themselves for deportation. Quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens"); *see also Matter of Merced*, 14 I & N Dec. 644 (BIA 1974), *aff'd mem.* 514 F.2d 1070 (5th Cir. 1975); *Lopez-Tellez v. INS*, 564 F.2d 1302 (9th Cir. 1977).

[18] *See* 8 C.F.R. §§ 3.1(b), 103.3(a)(3)(iii) ("No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings").

[19] *See McNary* 898-99 (under the government's approach, the courts of appeal "also would lack the factfinding and record-developing capabilities of a federal district court. . . . [S]tatutes that

6. to be deprived for years of "employment authorization," and thus suffer the severe hardship of having no legal right to work in this country, throughout this entire lengthy period.[20]

McNary concluded that it "seems plain to us . . . that restricting [generic challenges] is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* 899; see further, Kanstroom, "Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get Into Court?" 25 HARV. C.R.-C.L. L. REV. 53 (1990). The key question then is not whether the challenges are "direct" or "collateral," but whether, as *McNary* directs, they assert a generic constitutional or statutory claim, as indeed they do.

Finally, even accepting INS' direct/collateral distinction, the present cases fall on the "collateral" side of the line. In neither of these cases did plaintiffs request, nor receive, legalization. Rather, the relief sought and ob-

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provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record—circumstances that are not present in 'pattern and practice' cases where district court factfinding is essential. . . .").

[20] *See McNary* 892: "the mere filing of a 'non-frivolous application' entitled the alien to a work authorization that would remain valid during the entire period that the application was being processed"; *id.* 895: "the denial of [legalized] status places the alien in an even worse position than he or she was in before the Reform Act was passed because lawful employment opportunities are no longer available to such persons"; *see also* § 1255a(e)(2)(B) (providing employment authorization to any alien who presents a "prima facie" application for legalization); § 1255(a)(1)(B) (providing employment authorization to "an alien who is apprehended before the beginning of the application period . . . and who can establish a prima facie case of eligibility to have his status adjusted . . . (but for the fact that he may not apply for such adjustment until the beginning of such period). . . .").

tained only assured constitutionally and statutorily correct adjudication of their applications *by INS*. As this Court stated in a similar context in *UAW v. Brock*, *supra*, 477 U.S. at 477, that a grant, or denial, of legalization might eventually result from these cases is irrelevant.

In short, it is hard to believe that Congress intended mandatory exhaustion of claims whose resolution would not be furthered thereby.[21] And INS' analysis completely ignores the substantial burden on immigration judges and the courts of appeal if each of the hundreds of thousands of class members in these cases were ordered deported and then raised these issues in individual appeals under § 1105a. *McNary* 898-99.[22]

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[21] This argument is actually *stronger* here than in *McNary*, since the administrative process in *McNary* could have resulted in some individuals being granted legalization despite the procedural barriers that the INS imposed. As the Solicitor General noted in *McNary*, where the alien's challenge is to the INS' legalization *procedures* (rather than to a substantive eligibility guideline), the LAU might *still* grant legalization, notwithstanding the alleged violations. *See* Brief for Pet. in *McNary* at 18 n.14 (the LAU "could be urged to afford commensurate relief on statutory grounds, thus eliminating the need for judicial intervention. . . . Alternatively, an alien might be found ineligible on grounds unrelated to the constitutional issue"). In the present cases, by contrast, *any* administrative review would be necessarily futile and unilluminating.

[22] Had Congress intended § 1255a(f)(1) to be more broadly inclusive, statutory language to express such an intent was readily at hand. For example, *McNary* emphasized that Congress could have modeled § 1255a(f) on the more expansive language of § 1329—the general grant of district court jurisdiction under Title II of the INA—by channeling into specialized review "all causes . . . arising under any of the provisions of [the legalization program]." *Id.* 897. Similarly, Congress could have modeled § 1255a(f) on 38 U.S.C. § 211(a), which governs review of veterans' benefits claims, by broadly referring to "[review] on any question of law or fact under [the legalization program]." Or Congress could have adopted the Senate's original version of this language, which broadly referred to "review (by class action or otherwise) of a decision or determination under this section." But Congress chose none of these broader options—thus its choice of the narrower language was surely intentional.

Indeed, the Senate's broad proposed language was expressly rejected in Conference (*see* S. Rep. No. 132 *supra*, 48) in favor of the more limited House bill, which differed from the Senate version in three principal respects: 1) it did not include the broad reference to "decision" or determination; 2) it did not include an express ban on class actions; and 3) it did not refer to "this section" or to the provision in that section of the Senate bill for Attorney General rulemaking. Indeed, in the final version of IRCA, the Attorney General's legalization program rulemaking authority (§ 1255a(g)) is not even mentioned until *after* the specialized review provision (§ 1255a(f)), thus further indicating that rulemaking was *not* subject to that review provision.

5. **Section 1105a.** Congress incorporated § 1105a, which governs direct appellate review of INS deportation orders, into IRCA's specialized review provision: [t]here shall be judicial review of such a denial [of "a determination respecting an application"] only in the judicial review of an order of deportation under section 1105a." § 1255a(f)(4)(A). Section 1105a has been consistently interpreted, by this Court and others, to permit independent district court review of legal challenges to INS regulations and policies, even when application of those policies could ultimately result in a deportation order.[23]

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[23] *See, e.g., El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 941 F.2d 950, 953 (9th Cir. 1991); *Campos v. Nail*, 940 F.2d 495 (9th Cir. 1991); *Montes v. Thornburgh*, 919 F.2d 531, 535-39 (9th Cir. 1990); *National Center for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vac. on other grounds*, 481 U.S. 1009 (1987), *reaff'd on remand*, 913 F.2d 1350, 1352 (9th Cir. 1990), *rev. on other grounds*, 112 S. Ct. 551 (1991); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984); *Salehi v. District Director, INS*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 364 (C.D. Cal. 1982); *Hotel & Restaurant Employees Union v. Smith*, 563 F. Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F. Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); *see also Cheng Fan Kwok v. INS*, 392

This construction of § 1105a must be deemed to have been incorporated into IRCA. *Lindahl v. Office of Per. Mgmt.*, 470 U.S. 768, 782 n.15 (1985). The machinery of § 1105a (and its uniform body of case law) informs the meaning of "a determination respecting an application" in § 1255a(f)(3). Its incorporation shows Congress did *not* intend generic challenges to policies and regulations, which exist separate and apart from any specific individual adjudication, to be cabined by § 1255a(f). As here, they can be reviewed where there has been *no* "determination respecting an application" in an individual case.

II. REMEDY.

INS' suggestion that the district court orders tolling the application deadline contravene *INS v. Pangilinan*, 486 U.S. 875 (1988) founders for two key reasons. First, it ignores the basic difference between the unique role that courts play in the naturalization process, a role which is the determinative core of *Pangilinan*'s rationale. Second, it ignores the significant doctrinal change in this Court's equitable tolling jurisprudence articulated in *Irwin v. Veterans Administration*, 498 U.S. ——, 111 S. Ct. 453 (1990) two years after *Pangilinan*.

1. *Pangilinan* reviewed a district court order that granted naturalization to aliens who had applied after Congress' express time limit. This Court explained that the "more fundamental" problem with the order was that "the power to make someone a citizen . . . has *not* been conferred upon the federal courts, *like mandamus or injunction* . . . [except] in strict compliance with the terms of the authorizing statute. . . ." 486 U.S. at 883-84 (emph. add.). In short, this Court held that a court exercising

U.S. 206, 210 (1968) ("In situations to which the provisions of § 106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court.").

naturalization powers is acting pursuant to an express Congressional delegation, more like an administrative agency that can act, like any other such agency, only strictly within its delegated powers.

Pangilinan amplified on this point in several different ways: " 'A person may be naturalized . . . in the manner . . . prescribed [in the INA], and not otherwise,' " 486 U.S. at 884, quoting § 1421(d); " 'Once it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to . . . grant citizenship.' " *Id.* 885 [citation omitted]; "Neither by application of the doctrine of estoppel . . . nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations." *Id.* See further, 4 Gordon & Mailman, IMM. LAW & PROC. § 94.02[1], p. 94-24.

A district court does not act *qua district court* when it exercises naturalization powers. Rather, it is acting as a special "naturalization court," defined in § 1101(a)(24) to include, but not be limited to, district courts.[24] From 1790 to 1990, "naturalization courts" also included state or territorial courts. 4 Gordon & Mailman, *supra*, § 94.02[1], p. 94-24; see further, *id.*, pp. 94-20 to 94-26. Indeed, the hybrid nature of a naturalization court is shown by the fact that from 1906 to 1990, "naturalization was the *joint* responsibility of the courts and administrative officers. . . ." *Id.* at pp. 94-17 to 94-18, a quite unusual blending of judicial and executive powers.

2. The district court decisions to toll the May 4, 1988 application date in a limited way for injured class members, under the particular circumstances of these cases,

[24] Congress provided in the Immigration Act of 1990, P.L. 101-649, Title IV, for the cessation of the judicial naturalization so this discussion is historical, not a description of the contemporary role. Now, naturalization is an unalloyed executive function, done by the Attorney General. See further, 4 Gordon & Mailman, *supra*, § 94.01[1][f], pp. 94-11 to 94-14.

were squarely supported by the long line of cases culminating in *Bowen v. City of New York*, 476 U.S. 467 (1986) and *Irwin v. Veterans Administration*, *supra*. However, there is nothing in these cases that warrants certiorari since they call for rather simple application of the principles of those cases, which, when applied, are bottomed in Congressional intent. Each case then is peculiar to the particular text and its legislative history. Unless these very recent cases are to be jettisoned, there is no reason *in the purposes of certiorari* for the Court to return so promptly to ground just surveyed.

Irwin was a Title VII case. The lower courts rejected the claim because Irwin had filed beyond the 30-day statutory filing period, reasoning that the period was jurisdictional, the same contention as that made here. The Chief Justice's opinion for the Court frankly notes that "our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent, even though the cases may be distinguished on their facts." *Id.* 456. He then went on to emphasize that:

> to decide each case on an *ad hoc* basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. *We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.* *Id.* 457 (emph. add.)

The rule is a rebuttable presumption in favor of equitable tolling, just like that applicable in "suits between private litigants [which are] customarily subject to 'equitable tolling'" (citing *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 309 (1989)), with an examination of Congressional intent serving as the source of rebuttal, if any. *Irwin* 457.

The strength of this presumption can be seen from the comparison in *Irwin*, at 457, of the Title VII language at issue there ("'within thirty days . . . an employee . . . may file a civil action. . . .'") with the operative language in *Soriano v. United States*, 352 U.S 270 (1957) ("'every claim . . . shall be barred unless the petition . . . is filed . . . within six years. . . .'"), the case that essentially was overruled by *Irwin*. *Irwin* then said: "An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Irwin* 457. The text of § 1255a(f)(2) on which INS relies is no more stringent than that of *Soriano*.

Bowen v. City of New York, 476 U.S. 467 (1986) is poignantly instructive. A class of disabled Social Security applicants sought benefits in plain contravention of the 60-day appeal period. The 60-day period was nonetheless tolled because "[w]here the Government's secretive conduct prevent[ed] plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time . . . [to allow for] a reasonable opportunity to learn the facts. . . ." *Id.* 481.

Bowen emphasized that the fundamental inquiry in such a case is if tolling would be "'consistent with the *overall* congressional purpose.'" *Id.* 480 (emph. add.). Here, such consistency is manifest since that purpose is to maximize the number of legalizable aliens, the "shadow population," *McNary* 891, in our midst. This could be accomplished only by ensuring a *full* twelve months to apply, preceded by an education and outreach period, during which undocumented aliens would get *correct* advice and be truly *encouraged* to come "out of the shadows" and apply. (See further, pp. 3-5 above.)

Bowen stressed that the Social Security Act is "'unusually protective' of claimants." *Id.* at 480. The same can

be said of Congress' insistence that IRCA be construed "in a liberal and generous fashion. . . ." H.R. Rep. No. 99-682, *supra*, 72. *Bowen*'s conclusion is doubly applicable: "All of the class members who [had failed to comply with the time limitation] were entitled to believe that their Government's determination of *ineligibility was the considered judgment of an agency faithfully executing the laws*. . . ." 476 U.S. at 480 (emph. add.). So too here.

Finally, INS' suggestion that § 1255a(f)(2)'s preclusion of judicial review of untimely applications bars equitable tolling does not withstand scrutiny. This puts the cart before the horse, the prior question being: is a constructively-filed, *nunc pro tunc* application late filed? INS assumes no equitable tolling. But, when the application period is briefly tolled *in order to fulfill* Congressional intent (here regarding the effect of "brief absences") an application filed *during that period* is not untimely. There, "tardiness" is due solely to *INS*' actions. A reasonable interpretation of § 1255a(f)(2) is that Congress could not have intended it to apply to a situation where INS' interpretation of an eligibility guideline is so unfaithful to legislative intent. (This appears to be so obvious that there is no need to resort to the "generous, liberal" standard.) It is surely fair for Congress to have concluded that when it rejected the Attorney General's views on the subject (see pp. 6-7 n.3 above), INS would have realized that the policy dispute was over.

CONCLUSION

For the reasons stated, class members in both cases urge that the Petition for Writ of Certiorari be DENIED.

Respectfully submitted,

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